87-940

Supreme Court, U.S.
FILED
DEC 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1987

CLIFFORD RAY SINCLAIR, *Petitioner*

v.

MONTGOMERY COUNTY, ALABAMA, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL BOYD
218 East Louisiana Street
McKinney, Texas 75069
214/542-0191

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether a Texas plaintiff seeking recovery under 42 U.S.C. § 1983 against the State of Alabama for wrongful arrests and attempts at extradition through unlawful means, may maintain a suit in the district of his arrest under the federal venue statute, 28 U.S.C. § 1391(b), and in light of this Court's opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Petition	4
Conclusion	8
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

TABLE OF AUTHORITIES

Page

Cases

Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd*, *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) 5

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) ..... i, 4, 5, 6

Maney v. Ratcliff, 399 F.Supp. 760 (E.D. Wis. 1975) 7

Statutes:

Civil Rights Act of 1964, 42 U.S.C. 1983 (1986) ..... i, 4, 7, 8

Venue Statute, 28 U.S.C. § 1391(b) (1977) ..... i, 2, 4, 5, 6, 8

In The

Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

CLIFFORD RAY SINCLAIR, *Petitioner*

v.

MONTGOMERY COUNTY, ALABAMA, et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Clifford Ray Sinclair respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered September 11, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is not reported. The orders of the district court (App. B, infra) was not accompanied by an opinion.

JURISDICTION

The judgment of the court of appeals (App. C, infra) was entered on September 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

* The other parties to this case are Respondents Jimmy Harold Evans, Eleanor I. Brooks, Mac Sim Butler, O. C. Thompson, State of Alabama, Brian E. Morgan, Alabama Securities Commission and Landon Thomas Aldrich a/k/a Landon Thomas Aldridge.

STATUTORY PROVISIONS INVOLVED

1. Venue Generally, 28 U.S.C. 1391(b) (1977) provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

STATEMENT

1. In the Spring of 1977, Petitioner, Mr. Sinclair began doing business in Plano, Texas, under the name of Diversified Financial and Management Services. As a part of the business, Mr. Sinclair assisted individuals in preparing applications for loans and submitting those applications to lending institutions. Mr. Sinclair had a local representative in Alabama who solicited prospective customers. The local representative was to locate a person interested in obtaining a loan, obtain the necessary information and submit the application to Mr. Sinclair in Plano, Texas. The local representative collected a small fee in connection with the services.

Apparently, during this same time, the local representative in Alabama solicited the information from prospective customers and collected the initial fee, but unbeknownst to Mr. Sinclair failed to forward the information to him. Thereafter, the District Attorney of Montgomery County, Alabama, sought and obtained 24 indictments against Mr. Hunt, the local representative. Mr. Hunt later entered into an agreement, under which he made complete restitution to each of the individuals involved in the above 24 counts.

During the May 1978 term of the Montgomery County Grand Jury, the local District Attorney caused Mr. Sinclair to be indicted on the same 24 counts. Thereafter, on May 30, 1978, Mr. Sinclair was arrested in the Eastern District of Texas, without a warrant, and prior to any requisition of

Mr. Sinclair by the State of Alabama. The State of Alabama then requested the Governor of the State of Texas to deliver Mr. Sinclair to Alabama on or about July 5, 1978. In September of that year, the Governor of the State of Texas held a hearing on Alabama's extradition request, at which time the request was denied.

The State of Alabama made no further attempts to extradite Mr. Sinclair between the end of 1978 and March of 1984. At that time, the Defendants filed a second request for extradition, but then withdrew that request prior to any determination being made thereon. Again, in May of 1984, Alabama filed its third request for extradition, but again, withdrew that request prior to any judicial determination made with respect to its sufficiency.

On May 17, 1984, Defendants filed a fourth request for extradition which resulted in a Governor's warrant being issued for the arrest of Plaintiff. Mr. Sinclair was arrested, and thereafter filed his application for a writ of habeas corpus in Rockwall County, Texas. That court issued its final order ordering Mr. Sinclair discharged. The Defendants took no further action until May of 1985, at which time they caused Mr. Sinclair to be arrested again on the very same old indictments. Once again, a writ of habeas corpus was filed and a second judicial determination was made discharging Mr. Sinclair. That court's final order further included certain findings which, under the doctrine of res judicata, would prevent Defendants from continuing to attempt to extradite Mr. Sinclair.

Despite all of the above, however, Defendants caused Plaintiff to be arrested again on December 20, 1985, in Dallas, Dallas County, Texas on the same old indictments.

As a result of the actions of Defendants, Plaintiff instituted this suit in the Marshall Division of the Eastern District of Texas seeking relief from Defendant's actions.

2. Petitioner brought this action in the Marshall Division of the Eastern District of Texas seeking declaratory and injunctive relief and monetary damages against Respondents for violation of his civil rights as provided by 42 U.S.C. § 1983. Respondents moved to dismiss on the grounds the court lacked jurisdiction and venue was improper in the Eastern District of Texas under 28 U.S.C. section 1391 (b).

The trial court heard Respondent's motions to transfer venue and, upon finding that "all relevant actions occurred in the Middle District of Alabama," the court issued its Order (App. B1, infra) transferring this cause to that district. Petitioner then filed his Motion for Rehearing, asking the court to maintain venue in the Eastern District of Texas. The trial court, upon reconsidering its earlier Order, did not maintain venue in the Eastern District of Texas, but, rather, dismissed Petitioner's case.

On appeal, the Fifth Circuit affirmed the decision of the district court. The sole issue before the appeals court was whether this Court's opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) mandated venue only in the Middle District of Alabama. In the opinion of the Fifth Circuit, *Leroy* was controlling despite various distinguishing factors between that case and the case at hand. The court rejected Petitioner's argument that the apparent risks of multiple venue locations in *Leroy* were not present in this case and held that venue was proper only in Alabama (App. A, infra).

REASONS FOR GRANTING THE PETITION

This case presents an important question of law concerning the scope of this Court's opinion in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) and the proper interpretation of the federal venue statute, 28 U.S.C. §1391(b). Essentially, if *Leroy* is held to establish a single

location for venue in section 1983 claims and the special needs of a plaintiff must be disregarded, then for practical purposes, a new form of "venue gap" is created under § 1391 (b).

1. Section 1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

The issue before this Court in *Leroy* was where a claim arises for the purposes of § 1391(b). In that case, a Texas plaintiff filed suit in the Northern District of Texas to have an Idaho takeover statute declared invalid insofar as it purported to apply to interstate cash tender offers to purchase securities traded on a national exchange. *Leroy* at 175. The only contact between the state of Idaho and the Northern District of Texas was that the tender offer was made by the plaintiff in Dallas, Texas and the offer was delayed by failure to comply with the Idaho statute. *Id.* at 176-177.

The district court held that venue was improper under § 1391(b) and the Fifth Circuit reversed, holding instead that the injury had occurred in Texas and venue was proper there. *Great Western United Corp. v. Kidwell,* 577 F. 2d 1256, 1265-74 (5th Cir. 1978). This Court reversed the Court of Appeals and held that venue was proper only in the state of Idaho. *Leroy* at 185.

In so holding, the Court recognized that " . . . the purpose of statutorily specified venue was to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Id.* at 183-84. The Court further recognized that in allowing venue where the claim arose, Congress intended to close the "venue gap" which existed in some suits involving multiple defendants and to restrict

venue "to the residence of the defendants or to 'a place which may be more convenient to the litigants'—i.e., both of them— 'or to the witnesses who are to testify in the case.'" *Id.* at 185 (citing S. Rep. No. 1752, 89th Cong., 2d Sess. 3 (1966)). From this, the Court reasoned,

> In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, a plantiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)—may be assigned as the locus of the claim.

Id. This Court then concluded that where the only action taken was in Idaho, by Idaho residents, the bulk of witnesses resided there and where holding otherwise could subject the defendants to suit in almost any district, venue was proper only in Idaho. *Id.* at 185-87.

2. This Petition does not question the rationale or conclusion of the *Leroy* decision, but rather, its application to the choice of venue by a plaintiff who is subjected to direct injury in his district of residence when the defendant has acted against him individually. Furthermore, this Petition questions the propriety and justice of creating a new "venue gap" within § 1391(b).

2a. Petitioner asserts that *Leroy* is not controlling when a defendant acts directly against a particular plaintiff. In *Leroy*, the plaintiff sought to hold an Idaho statute generally unconstitutional through proceedings in a Texas court. Unlike the facts in *Leroy*, Petitioner does not challenge the constitutionality of any Alabama statute but urges that he was the victim of acts by the State of Alabama directed par-

ticularly against him and in violation of his civil rights as provided by 42 U.S.C. § 1983. *See* Statement, supra at 2-3. Furthermore, the districts where the cause of action arose were limited and within the sole control of the Defendant, not the Plaintiff. Alabama caused the Petitioner to be unlawfully arrested in both the Eastern and Northern Districts of Texas. Statement, supra at 2-3. While their acts may have been orchestrated in Alabama, it was clear that the aid of Texas law enforcement personnel would be required and that the impact would be upon the plaintiff in those districts. On these facts, it cannot be argued that the Eastern District of Texas was an "unfair or inconvenient" district for suit.

Petitioner urges that his situation and those like it should be controlled by *Maney v. Ratcliff,* 399 F.Supp. 760 (E.D. Wis. 1975). In *Maney,* a Wisconsin resident brought suit in the Eastern District of Wisconsin against Louisiana officials under 42 U.S.C. § 1983 for repeated arrests in that district and failure to forward extradition papers. *Maney* at 764-66. As residents of Baton Rouge, Louisiana, all defendants moved to dismiss for improper venue. *Id.* at 764. In overruling the motion, the district court reasoned that § 1983 claims should be read against the background of tort law and as such, the claim arises where the injury occurs. *Id.* 766-67. Furthermore, the court recognized that many of the operative facts had occurred at the location of arrest. *Id.* at 767. As in *Maney*, Petitioner's cause of action should be held to arise in the districts of his arrest.

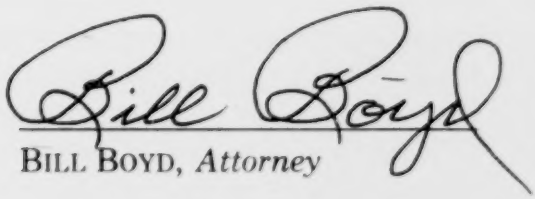
2b. Finally, Petitioner urges that if the Fifth Circuit opinion is correct in holding that venue is proper only in Alabama, a form of "venue gap" is created as to him and victims like him. Petitioner's cause of action arises out of repeated unlawful arrests and attempts to extradite him to stand trial. Pragmatically, if he is required to pursue his cause of action in Alabama, he will be put to a difficult

choice—either submit himself to Alabama jurisdiction and authorities for arrest or allow his claim to go unresolved. The result is both unjust and a threat to our liberties. The purposes behind the enactment of § 1983 cannot be fulfilled when a state is allowed to reach out beyond its borders into a sister state and cause direct injury to the resident of that state and, at the same time, prevent a remedy through threats of prosecution and incarceration. Such a "venue gap" is certainly as serious as any Congress sought to avoid when it amended § 1391(b) to allow venue in the district where the cause of action arose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



BILL BOYD, *Attorney*

December 1987

APPENDIX A

Opinion of the United States Court of Appeals

For the Fifth Circuit

No. 86-2694

Entered: September 11, 1987

Before REAVLEY, RANDALL and JOLLY, Circuit Judges.

Reavley, Circuit Judge:*

Clifford Sinclair appeals the dismissal of his suit against officials of the State of Alabama and Montgomery County, Alabama, in which he alleged bad faith prosecutions in violation of 42 U.S.C. § 1983. Sinclair's sole contention on appeal is that the court abused its discretion by failing to retain jurisdiction of this case in the Eastern District of Texas. We affirm.

Sinclair's petition states that from May 1978 to December 1985 appellees engaged in a conspiracy to violate his civil rights by repeatedly seeking his extradition from Texas to Alabama and by causing him to be unlawfully arrested. A 24-count Alabama indictment alleged that Sinclair committed theft by pretense against several Alabama victims. Sinclair asserts that he conducted a legitimate business in Texas assisting individuals to prepare loan applications and that he had a local representative in Alabama whose job was to solicit customers, but who actually defrauded them. Appellees caused Sinclair to be arrested in Texas a number of times, and made four extradition attempts. On two occasions the Governor of Texas held a hearing on Alabama's request, but denied extradition. Even after this, Sinclair was again arrested at Alabama's request, but was released on bail.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Sinclair filed his section 1983 suit in federal district court for the Eastern District of Texas. The appellees' response was a motion to dismiss for improper venue. The court initially transferred the case to the Middle District of Alabama. Sinclair, however, contended that dismissal is more appropriate than transfer, and the court granted his motion for dismissal.

The general venue statute states:

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plantiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

28 U.S.C. § 1391. The instant case consists of a Texas plaintiff bringing a federal claim against Alabama defendants. Federal jurisdiction is founded both on diversity of citizenship and federal question jurisdiction. Plainly, therefore, section 1391(b) applies, and Sinclair may bring suit only where defendants reside or where the claim arose.

Sinclair does not dispute the fact that all the defendants reside in Alabama. He asserts, however, that the claim arose in part in the Eastern District of Texas, on the ground that the initial 1978 arrest occurred there. Sinclair cites *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975), in which a Wisconsin plaintiff brought a section 1983 action against various public officials of Baton Rouge, Louisiana. Although all of defendants' acts occurred in Louisiana, plaintiff's arrests and detentions occurred in Wisconsin, and the court held that venue was proper there. The court held that, in a section 1983 claim, like a tort action, the rule is "that the claim or cause of action arises where the injury occurs." *Id.* at 767.

While *Ratcliff* is indeed apposite and supportive of Sinclair's position, we believe that it was effectively overruled by the Supreme Court four years after it was issued. In *Leroy v. Great Western United Corp.,* 443 U.S. 173, 99 S.Ct. 2710, 51 L.Ed.2d 464 (1979), the Court discussed the meaning of the words "where the claim arose" as they appear in section 1391. At issue in *Leroy* was whether venue was proper in the Northern District of Texas in a suit challenging the constitutionality of Idaho's statutory restrictions on purchasers of stock. The alleged harm to the prospective Texas purchasers occurred in Texas, but the actions of the defendants occurred in Idaho. Construing "the plain language of § 1391(b)," the Court stated: "it is absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts. Rather, it restricted venue either to the residence of the defendants or to 'a place which may be more convenient to the litigants' — i.e., both of them — 'or to the witnesses who are to testify in the case.' " *Id.* at 185, 99 S.Ct. at 2717 (citations omitted). In the instant case, convenience favors the Alabama location, since defendants and witnesses reside there. Section 1391(b) as interpreted by *Leroy* clearly yields the result that venue in this case is proper only in Alabama.

Moreover, Sinclair's effort to distinguish *Leroy* is unconvincing. He of course is correct that the facts are distinguishable, since that was a securities case and this is a civil rights case. The facts relevant to a venue determination nonetheless are similar: actions by government officials within one state have an alleged impact on a plaintiff in another state, a proper determination of the merits of the case requires construction of laws of the defendants' state, and the bulk of the evidence and witnesses are located in defendants' state. *See id.* at 185-86, 99 S.Ct. at 2717-18.

Appellant points our attention to the distinguishing fact that in *Leroy,* but not here, allowing venue in plaintiff's state would, be parity of reasoning, mandate allowing venue "in almost every district in the country." *Id.* at 186, 99 S.Ct. at 2718. Stock purchasers reside everywhere, but Sinclair has been arrested only in Texas. While we might agree that

this is a distinguishing fact, it was not the chief ground for the Supreme Court's opinion. As the Court emphasized, reading section 1391(b) to allow venue in the place of injury "is inconsistent with the underlying purpose of the provision, for it would leave the venue decision entirely in the hands of plaintiffs, rather than making it 'primarily a matter of convenience of litigants and witnesses.' " *Id.* (citation omitted). The relevant facts in the instant action are sufficiently similar to those in *Leroy* that the legal principles guiding a venue determination must be the same.

AFFIRMED.

APPENDIX B

1. Order of the U.S. District Court for the Eastern District of Texas MARSHALL DIVISION No. M-86-10-CA Entered: May 16, 1986

ORDER

Before the Court is Defendants' motion to dismiss and Plaintiff's response. Defendants seek dismissal of this action pursuant to F.R.C.P. 12(b) based upon 1) Insufficiency of process and service of process, 2) lack of personal jurisdiction, 3) improper venue, and 4) failure to state a claim upon which relief can be granted.

After hearing and a review of the complaint, motion, and response, the Court concludes that all of the relevant actions complained of occurred in the Middle District of Alabama and it is there that venue is proper. 28 U.S.C. 1404(A). Therefore, the Court *ORDERS* that the above-captioned case be *transferred* to the United States District Court for the Middle District of Alabama, Northern Division. As for Defendants' other grounds for dismissal, the Court is of the opinion these matters should await determination by the Middle District.

SIGNED AND ENTERED this 16th day of May, 1986.

SIGNED

ROBERT M. PARKER
United States District Judge

2. Order of the U.S. District Court for the Eastern District of Texas
MARSHALL DIVISION
No. M-86-10-CA
Entered: July 29, 1986

ORDER

Before the Court is Plaintiff's Motion for reconsideration of the Order of the Court of May 16, 1986, transferring this case to the Middle District of Alabama, Northern Division. The Court finds that Plaintiff's Motion is well founded and sets aside the May 16th Order and now *ORDERS* that this case be *DISMISSED.*

SIGNED AND ENTERED this 29th day of July, 1986.

SIGNED

ROBERT M. PARKER
United States District Judge

APPENDIX C

Judgment of the United States Court of Appeals
for the Fifth Circuit
No. 86-2694
D.C. Docket No. M86-10CA
Entered: September 11, 1987

CLIFFORD RAY SINCLAIR,
Plaintiff-Appellant,

versus

MONTGOMERY COUNTY, ALABAMA, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
Before REAVLEY, RANDALL AND JOLLY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

SEPTEMBER 11, 1987

ISSUED AS MANDATE: October 6, 1987.

Supreme Court, U.S.
FILED
JAN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-940

In The
Supreme Court of the United States
October Term, 1987

CLIFFORD RAY SINCLAIR,
Petitioner,

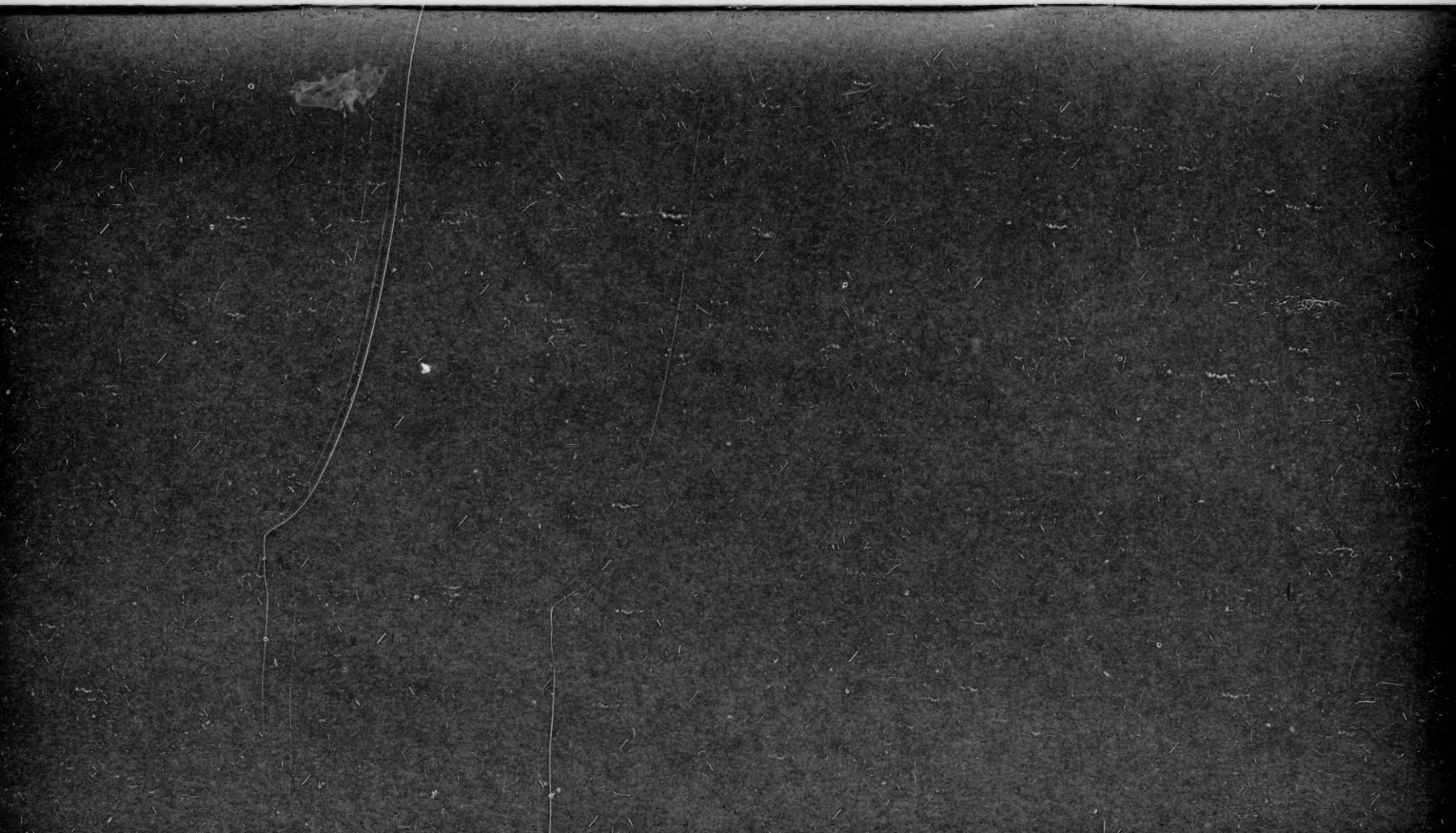
v.

MONTGOMERY COUNTY, ALABAMA; MONTGOMERY COUNTY COMMISSION; JIMMY HAROLD EVANS, District Attorney for Defendant Montgomery County, Alabama; ELEANOR I. BROOKS, Chief Deputy District Attorney for Montgomery County, Alabama; MAC SIM BUTLER, Sheriff of Montgomery County, Alabama; O. C. THOMPSON, Deputy Sheriff of Montgomery County, Alabama: STATE OF ALABAMA; BRYAN E. MORGAN, employee of The State of Alabama; ALABAMA SECURITIES COMMISSION; and LANDON THOMAS ADLRICH, employee of The Alabama Securities Commission,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RONALD W. JOHNSON
Counsel of Record
4700 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2177
(214) 741-1166
Attorney for Respondents Montgomery County, Alabama; Montgomery County Commission; Jimmy Harold Evans; Eleanor I. Brooks; Mac Sim Butler and O. C. Thompson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



QUESTION PRESENTED

Whether a Texas Plaintiff seeking injunctive relief and monetary damages against multiple Alabama officials and governmental entities* for alleged wrongful requests for extradition may maintain venue in the district of one of his arrests by unnamed Texas authorities after the District Court properly orders a transfer of the case to Alabama pursuant to 28 U.S.C. § 1404(a), but later dismisses the action at the Plaintiff's request.

---

*Montgomery County, Alabama; Montgomery County Commission (consisting of 8 Alabama residents); Jimmy Harold Evans; Eleanor I. Brooks; Mac Sim Butler; O. C. Thompson; State of Alabama; Bryan E. Morgan; Alabama Securities Commission (consisting of 16 Alabama residents); and Landon Thomas Aldrich.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	4
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Bredberg v. Long, 778 F.2d 1285 (8th Cir. 1985) ... 5

City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979) ... 5

Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986) 5

District No. 1, Pacific Coast District v. State of Alaska, 682 F.2d 797 (9th Cir. 1982) 5

Hustler Magazine, Inc. v. United States District Court for the District of Wyoming, 790 F.2d 69 (10th Cir. 1986) 5

Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947 (1st Cir. 1984) 5

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 4, 5

Maybelline Co. v. Noxell Corp., 813 F.2d 901 (8th Cir. 1987) 5

Milliken v. Myer, 311 U.S. 457 (1940) 7

Myers v. American Dental Association, 695 F.2d 716 (3rd Cir. 1982) *cert. denied*, 462 U.S. 1106 (1983) 5

Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1210 (1984) 5

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 7

Noxell Corp. v. Firehouse No. 1 Bar-B-Q Restaurant, 760 F.2d 312 (D.C. Cir. 1985) 5

O'Neill v. Battisti, 472 F.2d 789 (6th Cir. 1972) *cert. denied*, 411 U.S. 964 (1973) 5

Patch v. Playboy-Enterprises, Inc., 652 F.2d 754 (8th Cir. 1981) 5

TABLE OF AUTHORITIES—Continued

Page

Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (1987) 4, 6

Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984) 5

Rosenfeld v. S.F.C. Corporation, 702 F.2d 282 (1st Cir. 1983) 5

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 7

J. Walker & Sons v. DeMert & Dougherty, 821 F.2d 399 (7th Cir. 1987) 5

Watson v. Buck, 313 U.S. 387 (1941) 6

STATUTES:

28 U.S.C. § 1391(b) 2, 4

28 U.S.C. § 1404(a) 2, 3, 4, 6

No. 87-940

In The

Supreme Court of the United States

October Term, 1987

CLIFFORD RAY SINCLAIR,

Petitioner,

v.

MONTGOMERY COUNTY, ALABAMA; MONTGOMERY COUNTY COMMISSION; JIMMY HAROLD EVANS, District Attorney for Defendant Montgomery County, Alabama; ELEANOR I. BROOKS, Chief Deputy District Attorney for Montgomery County, Alabama; MAC SIM BUTLER, Sheriff of Montgomery County, Alabama; O. C. THOMPSON, Deputy Sheriff of Montgomery County, Alabama: STATE OF ALABAMA; BRYAN E. MORGAN, employee of The State of Alabama; ALABAMA SECURITIES COMMISSION; and LANDON THOMAS ADLRICH, employee of The Alabama Securities Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Montgomery County, Alabama, Montgomery County Commission, Jimmy Harold Evans, Eleanor I. Brooks, Mac Sim Butler, and O. C. Thompson respectfully request that this Honorable Court deny the Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit submitted by Petitioner Clifford Ray Sinclair.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1404(a), entitled "Change of Venue", provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

2. 28 U.S.C. § 1391(b), entitled "Venue Generally", provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

———o———

STATEMENT OF THE CASE

The following is offered as a supplement and correction to Petitioner's statement.

The Petitioner operated for ten months under the name of Diversified Financial & Management Services in the Northern District of Texas. He hired local "representatives" in thirteen states and two "representatives" in Alabama to sell his loan application services. The Petitioner's statement does not discuss the fact that he personally received at least half of the $100.00 to $350.00 fee collected from each of sixty Alabama residents without ever securing a loan. Also not mentioned is the fact that twenty-four "capias" arrest warrants were issued by the Circuit Court of Montgomery County on May 9, 1978 on

the basis of grand jury indictments. On May 30, 1978, Petitioner was arrested in the Eastern District of Texas by unnamed Texas officials under authority of such Alabama warrants. Such arrest by an unnamed Texas sheriff, occurring nearly eight years before this action was filed, is the only basis asserted by Petitioner for maintaining venue in the Eastern District of Texas.

Four separate requests for extradition to the Governor of Texas were consistently thwarted until the Governor of Texas finally issued a Governor's warrant for the Petitioner's arrest. Instead of returning to Alabama to defend the charges, the Petitioner sought and received a Writ of Habeas Corpus in a Texas State Court. Thereafter, the Governor of Alabama filed a fifth request for extradition, but once again, Petitioner sought and received a Writ of Habeas Corpus in the same Texas State Court.

On December 19, 1985, when it was discovered that Petitioner was being held in the Northern District of Texas on unrelated federal indictments, one of the Respondents requested that Petitioner be detained. Again, instead of returning to Alabama to defend the charges, Petitioner filed this action for declaratory and injunctive relief and monetary damages against thirty Alabama officials, Montgomery County and the State of Alabama. The Honorable Robert M. Parker, United States District Judge for the Eastern District of Texas, ordered that the action be transferred to the Middle District of Alabama pursuant to 28 U.S.C. § 1404(a) for the manifest convenience of parties and witnesses. Petitioner thereupon filed a Motion For Reconsideration, and in hi brief requested dismissal of the action as an alternative to transfer. The District

Court thereafter dismissed the action as requested. The District Court's Order was affirmed by a judgment of the United States Court of Appeals for the Fifth Circuit on September 11, 1987 on the exclusive grounds of improper venue.

—o—

REASONS FOR DENYING THE PETITION

The sole question presented in the Petition is whether this Court should grant an exception to the venue law established in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). However, the circumstances of this case present no special or important reasons for such an exception. Further, transfer of this case pursuant to 28 U.S.C. § 1404(a) was not a clear abuse of discretion by the District Court, and a subsequent dismissal at the Petitioner's own request is not error, especially when there are several valid alternative grounds upon which affirmance by the Fifth Circuit Court of Appeals might have been predicated.

(1) As stated by the Fifth Circuit Court of Appeals in its opinion affirming dismissal of this action for improper venue, this Court has already definitively addressed the Congressional intent underlying the "where the claim arose" segment of 28 U.S.C. § 1391(b) (*See*, Petition, p.A-3); *See also, Pennzoil Co. v. Texaco, Inc.*, — U.S. —, 107 S.Ct. 1519, 1532-33 (1987) (Marshall, T. concurring). As in *Leroy, supra*, Petitioner here complains of the constitutionality of the actions of non-resident governmental officials which foreseeably resulted in detriment to Petitioner in his district of choice. 443 U.S. at 177.

Also, as in *Leroy*, all of the defendant officials reside in another district, all of their actions took place in that other district, and all of the witnesses to those actions reside in that other district. In short, the Court of Appeals properly applied the *Leroy* rule in this case, and this case possesses no distinguishing characteristics to warrant consideration by this Court.

(2) The decision of the Fifth Circuit Court of Appals follows a consistent and unbroken line of authority stemming from this Court's decision in *Leroy*. There is no conflict in the numerous decisions of other Federal Courts of Appeals on this well settled issue. *See Noxell Corp. v. Firehouse No. 1 Bar-B-Q Restaurant*, 760 F.2d 312 (D.C. Cir. 1985); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1210 (1984); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984); *Rosenfeld v. S.F.C. Corporation*, 702 F.2d 282 (1st Cir. 1983); *Myers v. American Dental Association*, 695 F.2d 716 (3rd Cir. 1982) *cert. denied*, 462 U.S. 1106 (1983); *O'Neill v. Battisti*, 472 F.2d 789 (6th Cir. 1972) *cert. denied*, 411 U.S. 964 (1973); *J. Walker & Sons v. DeMert & Dougherty*, 821 F.2d 399 (7th Cir. 1987); *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979); *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901 (8th Cir. 1987); *Bredberg v. Long*, 778 F.2d 1285 (8th Cir. 1985); *Patch v. Playboy-Enterprises, Inc.*, 652 F.2d 754 (8th Cir. 1981); *Costlow v. Weeks*, 790 F.2d 1486 (9th Cir. 1986); *District No. 1, Pacific Coast District v. State of Alaska*, 682 F.2d 797 (9th Cir. 1982); *Hustler Magazine, Inc. v. United States District Court for the District of Wyoming*, 790 F.2d 69 (10th Cir. 1986).

(3) Contrary to Petitioner's assertions, the decision of the Fifth Circuit Court of Appeals does not create any form of "venue gap" with respect to Petitioner. Clearly, Petitioner's claim for redress for alleged harassment by Respondents could properly be brought in Alabama, the residence of all Defendants, and the federal courts in Alabama would be as competent as Texas federal courts in safeguarding Petitioner's rights and remedies. Petitioner's real complaint with regard to pursuing this civil action in Alabama is not that proper venue does not exist there, but is rather based upon no more than his desire to avoid that state so as to avoid potential criminal prosecution. It would hardly be unjust to require a lawfully indicted criminal defendant who had derived substantial income from Alabama residents to pursue an action in Alabama arising out of that business. Additionally, the possibility of standing trial on valid criminal indictments does not violate any right possessed by Petitioner since no citizen is immune from prosecution for his alleged criminal acts. *Watson v. Buck*, 313 U.S. 387, 400 (1941). Even should such a prosecution occur, it must be presumed that Petitioner will be given a full opportunity to present all appropriate factual and constitutional defenses. *Pennzoil Co. v. Texaco, Inc.*, — U.S. —, 107 S.Ct. 1519, 1529 (1987). For these reasons, the "venue gap" suggested by Petitioner is simply nonexistent.

(4) Even assuming, for the sake of argument, that the facts surrounding this action were somehow distinguishable from those in *Leroy*, a review of this case would necessarily require an assessment of whether this case was properly transferable under 28 U.S.C. § 1404(a). The convenience of the parties and witnesses and the interests

of justice are committed to the district court's broad discretion, *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955), and the facts presented in the Petition unquestionably show no abuse of that discretion. Further, the Petitioner specifically requested dismissal in his brief filed with the District Court and cannot now claim that such was error. *Milliken v. Myer*, 311 U.S. 457, 461 n.8 (1940).

(5) The dismissal of this action may also be predicated upon Respondents' numerous other defenses which have not yet been considered. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 525 (1974). Respondents have raised valid defenses of insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, abstention, exhaustion, statutes of limitations, failure to state a claim upon which relief can be granted and absolute or qualified immunities, among others. Dismissal of this case was therefore not an action which justifies an exercise of this Court's discretion in granting the Petition For Writ of Certiorari.

———o———

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

RONALD W. JOHNSON
Bar Card No. 10821800
4700 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2177
(214) 741-1166

Attorney For Respondents Montgomery County, Alabama; Montgomery County Commission; Jimmy Harold Evans; Eleanor I. Brooks; Mac Sim Butler and O. C. Thompson